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Joseph T. Davies, June Sutton, J. Kenneth Davies, Thomas L. Davies, Danie W. Davies, Lora A. Davies, and Pauline T. Davies v. Vivian M Bezzant and Eva Jane Cornwall: Brief of Respondents

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH T. DAVIES, JUNE SUTTON, J. KENNETH DAVIES, THOMAS L. DAVIES, DANIE W. DAVIES, LORA A. DAVIES and PAULINE T. DAVIES,

Plaintiffs and Respondents,

vs.

VIVIAN M. BEZZANT and EVA JANE CORNWELL,

Defendants and Appellants.

Case No. 14049

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Fourth Judicial District Court for Utah County, Honorable George E. Ballif, Judge

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vs.	)	
VIVIAN M. BEZZANT and EVA JANE CORNWELL,	)	
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BRIEF OF RESPONDENTS

NATURE OF THE CASE

Plaintiff filed an action to quiet title to a portion of the residential property encompassed within defendants' fence line. Defendants counterclaimed under the doctrine of boundary by acquiescence and sought to have the property within the confines of the fence line quieted in them.

DISPOSITION IN THE LOWER COURT

The lower court found in favor of the plaintiffs and entered a judgment quieting title in the plaintiffs.

RELIEF SOUGHT ON APPEAL

Respondents seek the affirmance of the lower court's judgment.

STATEMENT OF FACTS

Respondents agree with the Statement of Facts made by the appellants except that two additional facts should be

stated. The conveyance which is described in appellants' Statement of Facts at page 2 from Tippets to Elder was for a parcel of land having dimensions of 88.88 feet by 110 feet. The parcel of land which Elder testified that he went upon the land and staked out (Tr. 20) was a parcel of land having dimensions of 88.88 feet by 157.06 feet. The contract between Elder and the Olivers (Ex. 3) described the larger parcel while Elder's deed to the Olivers (Ex. 4) conveyed the smaller parcel. Also, the Uniform Real Estate Contract (defendants' Ex.3) between the Elders and Olivers contained the following statement: "Seller agrees to furnish title to Buyer at no extra cost to land between East boundary of said land and the proposed street, of which is included in the above descrip

ARGUMENT

POINT I

THE DISPUTE IN THIS CASE DID NOT ARISE OUT OF ANY UNCERTAINTY OR DISPUTE WITH RESPECT TO BOUNDARY LINES

The facts upon which the defendants rely as the source of their title occurred in 1950 (Tr. 19, 20). They consist of an oral agreement made between Elder and Beaman, contract buyers, and the owner, Tippets. The agreement between the vendee Elder and Beaman and the vendor, Tippets, was reached after Elder had constructed his home. (Tr. 20).

The agreement did not arise out of any uncertainty with respect to boundary lines. The agreement was an agreement of purchase and sale, one between a vendor and a vendee. The purpose of the meeting on the land in 1950 could only have been to secure a release or relinquishment which already

had been purchased. It could not be assumed that four men would mistakenly mark out a tract of land 157.06 feet long to identify a parcel 110 feet long.

The problems in this case arose because the purchase price of the land in dispute was not paid. They did not arise by virtue of any dispute or uncertainty respecting a boundary line. There are four deeds and a Certificate of Sale of Real Estate Under Foreclosure in the defendants' chain of title following the 1950 agreement between Elder as purchaser and Beaman and Tippets as vendors. All of the conveyances agree exactly.

First is the deed from Elders to Olivers, dated January 25, 1960. (Ex. 4). Next the Certificate of Sale of Real Estate Under Foreclosure dated January 10, 1963. (Ex. 10). Next the Olivers conveyed to Beneficial Industrial Loan Corporation in April of 1963. (Exs. 11 and 12). Beneficial Industrial Loan Corporation conveyed to the defendants in May of 1963. (Ex. 13).

None of the above conveyances included the land here in dispute.

Plaintiffs' predecessors in title, the Tippets, were not indolent or neglectful.

Tippets sold the land to Beaman in 1948. (Tr. 27). Sometime in 1952 Elder and Beaman called Neff Tippets while Mr. Tippets was living in Laramie, Wyoming. (Tr. 29, 45). They discussed the purchase of the land here in dispute and discussed the price to be paid. Neff Tippets discussed the

purchase of the land in dispute with Mr. Elder later in 1954 or 1955. (Tr. 31).

In 1958 Eugene Oliver inquired of Neff Tippets about clearing the title to the land in dispute. (Tr. 34). Neff Tippets obtained a survey from a licensed surveyor, (Ex. 5) and obtained a description preparatory to deeding the land to Oliver. (Tr. 34, Ex. 8).

Exhibit 6 is a copy of a letter written by Neff Tippets to Eugene Oliver in May of 1961 offering to sell the property to him for $300.00. No reply was received. In August of 1962 Mr. Tippets again wrote to Mr. Oliver (Ex. 7) and offered to convey the land. No reply was received.

In August of 1963 Eugene Oliver released any interest of his in the land. (Ex. 9).

Neff Tippets had a conversation in the presence of Mrs. Oliver about the land in 1958 (Tr. 34) and he asked Mrs. Oliver, now Eva Jean Cornwell, if she wanted to purchase the land in 1963. Mrs. Oliver said, "You'll have to see Eugene about that. He has got to pay for it."

When the Tippets sold their land to the plaintiffs in 1961 they excluded from the sale that portion of land here in dispute. (Tr. 46, 47). The disputed land was included in the contract with the plaintiffs only after Mrs. Oliver told Neff Tippets that he would have to talk with Eugene since he was the one who was to pay for the land, and after Eugene Oliver had released his interest in the land.

Evidence to support the foregoing consisted at the trial

of the testimony of Neff Tippets, one of the owners of the land in dispute. He testified with respect to conversations with Elder and Mr. and Mrs. Oliver. The court received copies of correspondence (Exs. 6 and 7) to support his oral testimony. Some of the strongest evidence is the release (Ex. 9) signed by Eugene Oliver releasing the land from any claim of his.

POINT II

THE PARTIES DID NOT MUTUALLY ACQUIESCE IN THE FENCE AS A BOUNDARY

The right of the Olivers to the possession of the land in dispute was questioned by Neff Tippets in the 1950s. (Tr. 29). Mr. Tippets testified he wrote to Elder in 1954 or 1955. (Tr. 30).

Defendants' predecessor in title inquired of Neff Tippets about the title in 1958. Mr. Tippets talked with Eugene Oliver in the presence of the defendant Eva Jean Oliver Cornwell in 1958 and pursuant to that discussion had a survey made and a description of the land made. (Tr. 34).

A letter was written by Tippets to Oliver in May of 1961. (Tr. 35). Oliver released his interest in 1963 and this action was commenced in 1972.

The record certainly would not support a finding that there was agreement or acquiescence in the fence as a boundary.

POINT III

THIS IS NOT A BOUNDARY LINE BY ACQUIESCENCE CASE

Every person, except Vivian M. Bezzant, who would have to have been a party to an agreement establishing the claimed

boundary, conveyed his interest in the property, the record title of which is owned by defendants, without including the land in dispute.

Elders conveyed to Olivers. Olivers, including Eva Jean Cornwell, conveyed to Beneficial Industrial Loan Corporation. Neither deed nor the deed back from Beneficial included the land in dispute.

The cases which consider the doctrine of boundary line by acquiescence are well known to this court and are cited by the appellants in their brief.

The recent case of Carter v. Lindner, 23 U. 2d 204, 460 P. 2d 830 cites the earlier case of Christensen v. Christensen, 9 Utah 2d 102, 339 P. 2d 101 and Tripp v. Bagley, 74 U. 57, 276 P. 912 for the proposition that unless there is an uncertaint with respect to the location of a boundary, that there can be no application of the boundary line by acquiescence doctrine.

The very recent case of Wright v. Clissold, 521 P. 2d 1224 states the elements necessary to establish a boundary line by acquiescence. The necessary elements are (1) occupation up to a visible line marked by monuments, fences or buildings; (2) mutual acquiescence in the line as a boundary; (3) for a long period of years; (4) by adjoining land owners.

The fence has existed for a considerable period of time. On the basis of the record the property in dispute has been occupied by the defendants and their predecessors in interest since some time in 1950.

There has been no mutual acquiescence. As outlined above,

the record title holders of the property in dispute have always asserted ownership to that land and have never agreed that the fence line marked the true boundary line of the property.

Had the defendants and their predecessors in title paid taxes on the property in dispute, then quite likely they could have obtained title through the doctrine of adverse possession. They did not pay the taxes and therefore that theory was not available to them. The payment of taxes is an essential ingredient of acquiring title through adverse possession. This is required by Title 78-12-12, Utah Code Annotated 1953. The requirement is mandatory. Central Pacific Ry. Co. v. Tarpey, 51 U. 107, 168 P. 554.

This case falls squarely within the rule enunciated in Hall v. Bingham, 528 P. 2d 151 in which this court said: "This is not a boundary by acquiescence case." In this case, as in Hall v. Bingham, supra, the land claimed by the defendants was not included in defendant Eva Jean Cornwell's own deed when she conveyed the property to Beneficial Industrial Loan Corporation. Neither was it included in the deed back to her from the Beneficial Industrial Loan Corporation. The amount of land was not small. It had dimensions of 88.08 feet by 57.06 feet and its omission could not have been an oversight.

POINT IV

DEFENDANTS' PROPERTY WILL NOT BE DESTROYED BY THE AFFIRMANCE OF THE TRIAL COURT

Defendants presently occupy property having an east to

west dimensions of 167.06 feet. They hold record title to 110 feet. Obviously the deprivation of the use of 57.06 feet will adversely affect the defendants' property, but it will not remove their access to it. It merely renders their property less desirable. The difference in value to the property was not thought to be worth $300.00 to the defendant Eva Jean Cornwell. She could have obtained the land for that sum and refused to do so. (Tr. 48).

CONCLUSION

Record title to the disputed property is unquestionably in the respondents. Neither the respondents nor their predecessors in title have ever agreed that the fence line found to exist in this case represented the true boundary line of the property. The record is full of evidence that there was no acquiesence in the claimed boundary line and that the record title holders have always claimed to be the true owners of the property. The judgment of the trial court should be affirmed

Respectfully submitted,

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